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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EUGENE ORANGE
PETITIONER

V.

A. HEDGPETH
WARDEN
RESPONDENT

CASE No. 07cv2066 JLS (WMC)

MOTION TO STAY IN ABEYANCE PENDING EXHAUSTION IN STATE COURT

INTRODUCTION

Petitioner is a State Prisoner serving a sentence of 111 years to life for a violation of Penal Code 187. Petitioner has filed a Habeas Corpus and exhausted three (3) issues in the State Courts and currently has one (1) issue pending in the California State Supreme Court. In order to avoid piecemeal litigation Petitioner request that this Court hold his currently pending and fully exhausted federal Habeas Corpus while Petitioner exhaust the remaining issue.

Should the (1) one remaining claim prove to be reversible error this Court would be relived of any duty to the Petitioner. Should the State Court deny Petitioner's Habeas Corpus, then it would be fully exhausted in the State Court and presentable to this Court. Then Petitioner could file an amended Petition to include the newly exhausted claim.

ARGUMENT

THIS COURT SHOULD GRANT PETITIONER'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE TO AVOID PIECEMEAL LITIGATION AND BECAUSE THE STATE PROCEEDING MAY PROVE DISPOSITIVE OF THE ENTIRE CASE.

The currently filed Federal Habeas Corpus petition contains (3) three fully exhausted claims. The (1) additional constitutional claim which Petitioner seeks to exhaust and to litigate has not been ruled on by the California State Supreme Court. However the claim is now before the California State Supreme Court, a reply is surely forth-coming.

Until recently this would have posed no problem. Petitioner could simply wait until the claims were exhausted in the State Court and then file a federal petition containing all the cliams. Unfortunately, this simple approach to Federal Habeas litigation has been complicated by **("AEDPA")**, 28 U.S.C. 2244(d)(1)(A), which gives a Petitioner one year to file a Habeas Corpus upon exhaustion of State proceedings, this allows for the 90 day peroid in which to seek a writ of Certiorari from the United State Supreme Court, if Certiorari was not sought, then from the last date Certiorari could have been sought. Bowen V. Roe, 188 F.3d 1157(9th Cir.1999).

The State Supreme Court denied review in this case on July 26, 2006. See: Attached. In addition to imposing a one-year statue of limitations, AEDPA went on to impose strict new limitations on the ability of State Petitioner's to pursue Federal Habeas relief a second time. SEE, e.g. 28 U.S.C. § 2244(b)(1)-(b)(2). Indeed, even before AEDPA, the Supreme Court itself had placed strict limitations on the ability of a State Prisoner to seek relief in Federal Court in a second or successor Petition. SEE, e.g., McCLESKEY V. ZANT, $((U.S. 467(1991).

In Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993) the Ninth Circuit held that because of these severe limitations on the ability to file a second Federal Habeas Petition, District Courts had discretion to stay properly pending Petitions in order to allow a Petitioner to exhaust a cognizable claim in State Court. 997 F.2d at 1301-1302. In reaching this conclusion, the Ninth Circuit followed the text of the Federal Habeas statue, which enjoins the Federal Courts to "dispose of the matter as Law and justice requires." Fetterly v. Paskett, supra, 997 F.2d 1301, citing, 28 U.S.C. § 2243 (emphasis added). The Fetterly case and this case share a common procedural similarity.

In Fetterly, Petitioner had been convict in State Court of murder. He filed a Petition in Federal Court attacking his conviction and sentence. While the Petition was pending, he discovered an addition to his claims.

He requested the District Court to stay proceedings to enable Petitioner to exhaust the claim in order to aviod the necessity of filing a second Federal writ premised upon the new claim. The District Court denied the request.

The Ninth Circuit held that this denial was an abuse of the District Courts discretion. Writing for a unanimous panal, Judge Trott noted "growing tendency of the Supreme Court to shut the door on second petitions...." 997 F.2d at 1301. Because the ineffective assistance claim was "cognizable under habeas" the Court concluded that the District Court had abused it's discretion in refusing to stay the proceedings. 977 F.2d at 1301-1302.

Other Circuits Courts rountinly follow this abeyance practice. SEE, e.g., Lawson v. Dixon, 3 F.3d 743,748 (4th Cir. 1993)(magistrate judge held proceedings in abeyance for resolution of unrelated but relevant state court proceedings), cert. denied, 502 U.S. 1171(1994); Stano v. Singletary, 952 F.2d 1273 (11th Cir. 1992)(granting petitioners motion and remanding to the District Court with instructions to permit exhaustion); Andrews v. Deland, 943 F.2d 1162, 1168, n.3. (10th Cir. 1991)(District Court stayed proceeding to permit exhaustion of State proceedings), cert. denied, 502 U.S. 1110(1992);Simmons v. Lockhart, 915 F.2d 372, 377 (8th Cir. 1990)(same); Nichols v. Perini, 818 F.2d 554,556(6th Cir. 1987)(District Court stayed proceedings to permit exhaustion of State remedies). All these case agree that Petitioner should file a Petition raising all exhausted claims and ask the Court for a stay until the remaining issues have been exhausted.

CONCLUSION

For the same reasons here, Petitioner seeks to have this Court hold his pending Petition -- which contains only exhausted claims -- in Abeyance. Just like the Petitioner in Fetterly, Petitioner's goal here is to exhaust his remaining Federal claims in State Court. Like the Petitioner in Fetterly, the claims he seeks to exhaust are Federal claims "cognizable under Habeas."

Significantly, if relief is granted in State Court, then the current Federal proceedings would be mooted and abeyance would have served "the Federal interest in economizing scarce Federal Judicial resource." Jennison v. Goldsmith, 940 F.2d 1308,1311 (9th Cir. 1991).

In short, and as Courts have done in similar situations throughout this country, this Court should adhere to the accepted abeyance practice in order to promote the orderly and efficient consideration of Petitioner's allegations of Federal Constitutional error. Petitioner has currently pending and fully exhausted Federal Habeas petition should be held in abeyance; this will ensure that this Court will "dispose of the matter as Law and Justice requires." 28 U.S.C.§2243.

DATED 12-7-07

RESPECTFULLY SUBMITTED
EUGENE ORANGE

[signature]
EUGENE ORANGE
PETITIONER